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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TAMARA FOODS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the NLRB, in a decision enforced by a judgment and order of the United States Court of Appeals for the Eighth Circuit, was correct in finding that employees are engaged in protected concerted activity under Section 7 of the Labor Management Relations Act when they walk out and make themselves unavailable for any work to protest the presence of ammonia fumes in their work area, even though such employees were not required to work in the presence of the fumes but were only required to wait in a safe area, with full pay, until the fumes could be removed from the work area and the employees could resume production.

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Tamara Foods, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 692 F.2d 1171 (1982). The Decision and Order of the National Labor Relations Board (Appendix B, *infra*), is reported at 258 NLRB 180 (1981).

JURISDICTION

The judgment and order of the Court below (Appendix C, *infra*) issued on November 17, 1982. On December 14, 1982 the Court of Appeals denied Tamara's Petition for Rehearing En Banc (Appendix D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act, 29 U.S.C. §141, *et seq.*, the Occupational Safety and Health Act, 29 U.S.C. §651, *et seq.* and one of the regulations promulgated thereunder, 29 C.F.R. §1977.12, 38 Fed. Reg. 2681, 2683 (1973), as corrected 38 Fed. Reg. 4577 (1973), are set forth at Appendix E, *infra*.

STATEMENT OF THE CASE

Petitioner uses an ammonia refrigeration system in its preparation of frozen onion rings and mushrooms. From time to time, ammonia fumes have leaked into the production area. In July of 1979, the Occupational Safety and Health Administration ("OSHA") inspected Petitioner's facility, found no violations of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §651, *et seq.*, and recommended the removal of employees from the production area when ammonia vapors were present until the ventilation system removed the vapors. Petitioner implemented both an evacuation plan and work rules as follows: (1) sick leave would be granted automatically to any employee upon request; (2) any employee who believed that there existed an unsafe or unhealthy condition at the plant was permitted to leave the work station and remain in a safe area (the lunchroom or outside the plant), with full pay, until the condition was corrected; (3) any employee who otherwise clocked out prior to the end of the shift would be

discharged.[1] OSHA approved, under its standards, Petitioner's ventilation system and evacuation plan.

After the start of the 7:00 a.m. shift on September 11, 1980, the employees smelled ammonia, left their work stations and proceeded to the lunchroom which was free of ammonia fumes. The employees were called back to the production area twice over the next two (2) hours, having been told by their supervisor that the problem had been corrected, but left after again detecting ammonia fumes. Many of the 50 employees began to clock out at approximately 9:18 a.m.; only one (1) employee requested and was granted sick leave. The employees' supervisor urged the employees to remain at the plant rather than clock out and told them that they could remain in the lunchroom (which was free of ammonia fumes) with full pay until the problem was corrected. Several employees objected to waiting at the plant. Petitioner's Plant Manager told all employees to remain at the plant or be discharged and those employees who had clocked out to clock back in or be discharged. Eleven (11) employees (twenty (20) percent of the shift) remained clocked out and were discharged; some employees who had clocked out clocked back in and were not discharged; the one (1) employee who requested and was granted sick leave was not discharged.

After a hearing held on the NLRB's Complaint, the Administrative Law Judge recommended dismissal, finding that the conduct of the eleven (11) employees, although concerted activity, was not protected under Section 7 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §157. The NLRB disagreed with its Administrative Law Judge, found that

---

[1] Petitioner's employees are not represented by a labor organization, and its work rules are not part of a collective bargaining agreement.

Petitioner had violated Section 8(a)(1) of the LMRA, 29 U.S.C. §158(a)(1), and ordered Petitioner to, *inter alia,* reinstate with full back pay the eleven (11) employees who had clocked out and had been discharged. The Eighth Circuit, acting upon the NLRB's Application for Enforcement and Petitioner's Cross-Petition for Review and exercising its jurisdiction under 29 U.S.C. §160(e), enforced the Decision and Order of the NLRB in its entirety.

REASONS FOR GRANTING THE WRIT

Review should be granted to resolve an important question of national labor policy not heretofore decided by this Court, *viz.*, whether employees who participate in a walkout and make themselves unavailable for any work when there is a potentially hazardous condition in their work area are engaged in concerted activity protected by Section 7 of the LMRA, 29 U.S.C. §157, for which they may not be discharged, when such employees are not required to work in the presence of any potentially hazardous condition but are only required to wait in a safe area, with full pay, until the potentially hazardous condition believed to exist can be and is removed from the work area.

In *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), seven (7) employees were discharged because they walked off their jobs to protest being required to work in extreme cold. This Court upheld the finding of the NLRB that the purpose of the walkout was to protest their employer's failure to provide adequate heat in their working area and was thus protected concerted activity under Section 7. However, although it was acknowledged that ". . . §7 does not protect all concerted activities . . .," the activities in question could not be

> ". . . characterized as 'indefensible' because they were found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities . . . . Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *Id.*, at 17.

In 1970, Congress enacted the OSH Act in order to prevent occupational deaths and injuries and ". . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.. . ." *Whirlpool Corporation* v. *Marshall,* 445 U.S. 1 (1980); 29 U.S.C. §651(b). This Court has noted, however, that

> ". . . the statute was not designed to require employers to provide absolutely riskfree workplaces . . . Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm." *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute,* 448 U.S. 607, 641 (1980).

This Court recently upheld the Secretary of Labor's promulgation of a regulation, 29 C.F.R. §1977.12, 38 Fed. Reg. 2681, 2683 (1973), as corrected 38 Fed. Reg. 4577 (1973), which was designed to protect under the OSH Act ". . . the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a belief that no less drastic alternative is available." *Whirlpool Corporation* v. *Marshall, supra,* 445 U.S. at 3-4. Justice Stewart noted in his opinion that the regulation did not ". . . conflict with the general pattern of federal labor legislation in the area of occupational safety and health" and that ". . . employees have a protected right to strike over safety issues" under Section 7 of the LMRA, citing *NLRB* v. *Washington Aluminum Co., supra. Whirlpool Corporation* v. *Marshall, supra,* 445 U.S. at 17 n. 29.

The regulation upheld by this Court protects an employee from discrimination if he ". . . refuses in good faith to expose himself to a dangerous condition . . ." provided that

> "[t]he condition causing the employee's apprehension of death or injury [is] of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." 29 C.F.R. §1977.12(b)(2).

However, the Court noted that the regulation

> ". . . simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous work place of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith." *Whirlpool Corporation* v. *Marshall, supra,* 445 U.S. at 21.

Relying upon *NLRB* v. *Washington Aluminum Co., supra,* both the Eighth Circuit and the NLRB refused to examine the reasonableness of the actions of Petitioner's employees. However, the significant factor in *Washington Aluminum* is absent in this case, in that there is no rule requiring employees to either work under the objectionable or hazardous condition or be fired. Petitioner's employees were not required to work under any purportedly hazardous conditions but were merely required to either wait in a risk-free area with full pay until the asserted condition could be corrected and production could be resumed, or to request sick leave, which would be automatically granted.

The discharged employees in this case demonstrated gross disloyalty bordering upon, if not constituting, insubordination

to Petitioner by clocking out and making themselves totally unavailable for any work. Their conduct resulted in the absence of twenty (20) percent of the workforce and totally frustrated Petitioner's ability to resume and maintain full production after the ammonia fumes were removed from the workplace. By not requiring its employees to work in the presence of the fumes, Petitioner more than adequately addressed the concerns of both the OSH Act and of the employees, and afforded the employees the very protection conferred upon them by 29 C.F.R. §1977.12. Further, the "wait with pay" rule here actually granted the employees those provisions considered but rejected by Congress in its deliberations under the OSH Act. See, *Whirlpool Corporation* v. *Marshall, supra,* 445 U.S. at 14-19.

The issue presented in this case is of great importance, in that the Decisions below totally frustrate the ability of an employer to maintain production while at the same time reasonably addressing the concerns of both its employees and the OSH Act by not requiring the employees to work under perceived or actual hazardous or unsafe working conditions. This Court's analysis of 29 C.F.R. §1977.12 in *Whirlpool Corporation* v. *Marshall, supra,* indicates that the discharge of employees who engage in a "safety protest" through work refusal is proper if such employees acted unreasonably or in bad faith. The precedent set by the Decisions below precludes inquiry into the reasonableness of employee conduct and broadly protects a total work refusal and concerted walkout over "safety issues" when the employees involved are not required to work under the very safety hazard they purport to protest.

Proper balancing and accommodation of an employer's right to maintain production with the rights of its employees to have a safe place to work and to engage in concerted activities over safety issues, under both the LMRA and the OSH Act, are threatened unless the Decisions below are reviewed and

ultimately reversed by this Court. *Cf., Southern Steamship Company* v. *NLRB,* 316 U.S. 31, 47 (1942). The Decisions below have created an excessively broad protection under Section 7 of the LMRA which must be narrowed by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Tamara Foods, Inc. respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2318

National Labor Relations Board,
Petitioner,

v.

Tamara Foods, Inc.,
Respondent.

On Application For Enforcement of an Order
of the National Labor Relations Board

Submitted: May 19, 1982

Filed: November 17, 1982

Before HEANEY, Circuit Judge, HENLEY,* Circuit Judge, and BECKER,** Senior District Judge.

BECKER, Senior District Judge

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* The Honorable J. Smith Henley assumed senior status on June 1, 1982.

** The Honorable William H. Becker, Senior District Judge, Western District of Missouri, sitting by designation.

The National Labor Relations Board (NLRB) has filed in this Court an application for enforcement of its order issued on September 30, 1981, against Tamara Foods, Inc. (Tamara) pursuant to Section 10(a)-(c), 29 U.S.C. § 160 (a)-(c) of the National Labor Relations Act (Act) as amended, 29 U.S.C. §§ 151, *et seq.* That Decision and Order of the NLRB is reported at 258 NLRB 180, 108 LRRM 1218. The Decision and Order of the NLRB disagreed with the Decision of an Administrative Law Judge (ALJ) recommending an order of dismissal of the complaint against Tamara by the Regional Director of the NLRB, charging unfair labor practices in violation of Section 8(a)(1) and Section 7 of the Act.

The material parts of (1) the Decision of the ALJ and (2) the Decision and Order of the NLRB are quoted hereinafter.

Decision of the ALJ

A complaint before the NLRB and Notice of Hearing before the ALJ, based on charges by employee Sharon Tueton, of unfair labor practices, against employer Tamara, were filed and served on Tamara, by the Acting Regional Director of Region 14. After the filing of an Answer by Tamara denying the charges of unfair labor practices, the issues were heard before an ALJ who filed the following Decision:

Statement of the Case

* * * * *

At issue is whether Respondent unlawfully discharged 11 employees who clocked out before the end of their shift to protest allegedly unhealthy working conditions.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

* * * * *

The relevant facts are simple and essentially undisputed.

Respondent, in the preparation of frozen onion rings and mushrooms, uses an ammonia refrigeration system. From time to time, ammonia has leaked into the atmosphere of the production areas, causing temporary respiratory discomfort. In addition, the processing of the onions temporarily causes tearing. At all relevant times, there has been a ventilation system in the work areas and an evacuation plan, both of which meet the standards imposed by the Department of Labor's Occupational Safety and Health Administration.

The following employment policies, fully understood by the employees, were in effect at all relevant times:

1. Sick leave would be granted automatically to any employee upon request.

2. Any employee who believed that there existed an unsafe or unhealthy condition at the plant was permitted to leave the work station and remain in the lunchroom or outside the plant, with full pay, until the condition was corrected.

3. Any employee who otherwise clocked out prior to the end of the shift would be discharged.

On September 11, 1980, shortly after commencement of the shift at 7:00 a.m., a number of employees smelled ammonia, left their work stations and proceeded to the lunchroom which was free of ammonia fumes. Shortly thereafter, supervisor Bury called the employees back to the production area. Again, the employees smelled ammonia and again they returned to the lunchroom. Three employees went outside for fresh air. Supervisor Bury again called the employees back to work, reporting that the

condition had been corrected. Once again the employees detected ammonia and, for the third time, left their stations. Of the approximately 50 employees in the production area, all remained at the plant, except 11 who clocked out at approximately 9:18 a.m. All employees were assured by plant manager Schopp that, consistent with Company policy, they could "sit around on their butts" and be paid for the full shift. He also reminded them that they would be discharged if they clocked out.

The 11 employees who did clock out were discharged for that reason alone. None of the 11 employees thereafter requested reinstatement; each testified they had intended to report to work the following day.

Based on their testimony at this hearing and at unemployment compensation proceedings, I find that none of the 11 had left the plant because of illness, none had requested sick leave and none had sought medical attention thereafter. . . . Their reason for clocking out prior to the end of the shift was best stated by employee Bressie:

> . . . we all decided that if we would go in a group, that something might be done about it instead of just, you know, leaving by yourself. (Tr. 163)

At no time, before or after they clocked out, did the employees present any demands to Respondent concerning working conditions.

On July 19, 1979, 14 months prior to the incident which gave rise to this proceeding, the Occupational Safety and Health Administration, acting on an employee complaint of ammonia leaks, conducted an on-site inspection of the productions areas and refrigeration system and interviewed a number of employees. No environmental violations were

found and it was recommended that Respondent remove employees from affected areas when vapors were present. Thereafter, such a policy was implemented by Respondent. By letter dated August 10, 1979, the complaining employee was informed by OSHA that "no alleged violations of Safety and Health Regulations were found as referenced in your complaint of ammonia leaking from the new freezer."

During the period of September 5-11, 1980, acting on a late August or early September 1980 complaint of one of the employees involved in this case, OSHA conducted another on-site inspection of the production areas and refrigeration system. Again, the environment was found to be safe, the ventilation system was found to be adequate, and, based on the compliance officer's interviews with management and employees, "the procedure for handling ammonia leaks and evacuation procedures appeared to be adequate." No violations were detected and the complaining employee was so notified by OSHA letter dated September 24, 1980.

Counsel for the General Counsel's theory is straightforward: The 11 employees, in protesting working conditions, were engaged in protected concerted activity, despite Respondent's compliance with OSHA standards and its policy to continue to pay employees who leave their work areas because of a belief that conditions are unhealthy and that, as economic strikers, they may be replaced but not discharged. In support thereof, she relies principally on *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 50 LRRM 2235 (1962).

For the reasons set forth herein, I conclude that the activity, although clearly concerted, was unprotected under Section 7 of the Act.

* * * * *

The 11 employees had no objective reason to fear that performance of their assigned task might result in personal harm. A safe workplace is not the equivalent of a risk-free one. To be unsafe, it must threaten employees with a significant risk of harm. *Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* ____ U.S. ____, 100 S.Ct. 2844 (1980). Ammonia leaks were quite infrequent and, while employees suffered discomfort, there is no evidence of actual illness and no evidence of any harmful effects of ammonia fumes. The refrigeration system and Respondent's evacuation plan met all OSHA standards and employees were so advised in 1979 and again in September 1980. Significant is the fact that they were not compelled to remain in the vicinity of the fumes; their immediate assignments at the time of their untimely departure were to stand by in the lunchroom or outside the plant to await repair of the equipment. There was, in fact, no risk of harm whatever to any production employee.

Moreover, the employees, as they had a right to do, already had initiated, under the Occupational Safety and Health Act, a complaint process which would lead to a Department of Labor compliance inspection. Previously, in 1979, an employee complaint of ammonia leaks resulted in an on-site inspection and a written opinion to the employee that no violations were detected. A second complaint, initiated only days prior to September 11, had rapidly brought to the plant another OSHA compliance officer and that inspection was in process on the very day that the 11 employees clocked out in order "that something might be done about [the ammonia fumes]."

* * * * *

Finally, at no time before or after their "strike" did the employees present a demand to Respondent. To be pro-

tected, a concerted protest of working conditions under Section 7 of the Act necessarily must be accompanied by a demand made upon the employer before, after or at the time of the activity.

* * * * *

Taken singly or together, the circumstances compell (sic) the conclusion that the actions of the 11 employees in clocking out before the end of the shift on September 11, 1980, were indefensible and thus unprotected, in that they demonstrated a gross disloyalty to their employer and were unnecessary for the protection of their legitimate concern for a safe and healthy workplace.

* * * * *

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, DISMISSED. (Footnotes omitted.)

Decision and Order of NLRB

Counsel for the General Counsel of the NLRB filed before the NLRB, timely exceptions to the Decision of the ALJ. After a hearing on the exceptions, briefs and record before the ALJ, a three member panel of the NLRB entered a unanimous Decision and Order concluding that Tamara violated Section 8(a)(1) of the Act, and ordered Tamara to cease and desist, and to take affirmative corrective action. It is enforcement of this Decision and Order that the NLRB seeks in this Court. The pertinent parts of the Decision and Order are as follows:

> The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm only so much of that Decision as is consistent with this Decision and Order.

The complaint in this proceeding alleges that Respondent violated Section 8(a)(1) of the Act by unlawfully threatening to discharge and discharging 11 employees for engaging in a strike over unhealthy working conditions. The Administrative Law Judge dismissed the complaint on the ground that the activity of the 11 employees, although concerted, was not protected by Section 7 of the Act. As further explained below, we find that the Act protects the rights of employees to strike over what they honestly believe to be unsafe and unhealthy working conditions, and we find, consequently, that Respondent's threat of discharge and its discharge of these employees for exercising those rights violated Section 8(a)(1).[1] [[1] The Administrative Law Judge failed to make a specific finding on the General Counsel's allegation, contained in par. 5 of the complaint, that Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge employees who clocked out of the plant to protest their working conditions. The record shows that this issue was fully and fairly litigated at the hearing. Accordingly, we consider this issue to be properly before us.]

Respondent, which is engaged in the business of preparing and selling frozen foods, uses an ammonia refrigeration system to freeze its products. On several occasions ammonia gas from the refrigeration system leaked into the production area where Respondent's employees work. Employees testified without contradiction that the ammonia fumes had caused them to experience nausea, burning sensations in their noses and throats, headaches, tightness in their chests, and difficulty in breathing.

Respondent recognized the problem of occasional ammonia leaks and had unilaterally promulgated work rules to be followed in such situations.[2] [[2] Respondent's employees are not represented by a labor organization and

Respondent's plant rules, therefore, are not part of any collective-bargaining agreement.] Under these rules, sick leave was to be granted automatically to any employee upon request; any employee who believed that an unsafe or unhealthy condition existed at the plant would be permitted to leave his or her work station and remain in the lunchroom or directly outside the plant, with full pay, until the condition was corrected; and any employee who clocked out prior to the end of the shift would be discharged.

On the morning of September 11, 1980, 15 or 20 minutes into the start of the 7 a.m. shift, the employees in the production area smelled ammonia leaking from the freezer system and began to feel its noxious effects. The employees, on their own initiative, left the production area and congregated in the lunchroom. Supervisor Helen Bury was then informed of the leakage and the employees were told to wait in the lunchroom until the problem was corrected.

Approximately 45 minutes later, Supervisor Bury informed the employees that the ammonia leakage had been stopped and directed them back into the production area. When the employees returned to the production area they found that it still contained ammonia fumes and was, in fact, worse then (sic) before. After working for 10 or 15 minutes, the employees retreated to the lunchroom for a second time and again reported the problem to Supervisor Bury. A number of employees went outside the plant for fresh air. Shortly thereafter, the employees were again assured that the ammonia problem had been corrected and were directed to return to the production area.

Upon their return to work for a third time, the employees continued to feel the harmful effects of the ammonia fumes. At this point, the entire complement of employees

left their work stations. Many of the 50 employes began to clock out.

Supervisor Bury tried to convince the employees to stay at the plant and told them they could remain in the lunchroom and be paid for waiting until the ammonia problem was corrected. Several employees objected, however, and said that they were not going to wait at the plant. When Plant Manager A. J. Schopp noticed that employees were waiting in line to clock out, and was told that several employees had already done so, he told them that they had "better go clock back in" and that those who clocked out should not "bother coming in tomorrow." Schopp further stated that any employees who left work should consider themselves fired.

After Schopp's statement that clocking out would mean discharge, most of the employees decided to remain at the plant. Some of those who had already clocked out, clocked back in. However, 11 employees remained clocked out and left the plant, for which they were discharged.

The Administrative Law Judge found, and we agree, that the action of these 11 discharged employees was clearly "concerted activity" within the meaning of the Act. However, unlike the Administrative Law Judge, we find that the conduct was also clearly protected.

It has long been established that Section 7 of the Act protects the rights of employees to engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions. *N.L.R.B.* v. *Washington Aluminum Company,* 370 U.S. 9 (1962); *Union Boiler Company,* 213 NLRB 818 (1974); *Du-Tri Displays, Inc.,* 231 NLRB 1261 (1977); *E. R. Carpenter Co.,* 252 NLRB No. 5 (1980); *Service Machine & Shipbuilding Corp.,* 253 NLRB No. 88 (1980).

In *N.L.R.B.* v. *Washington Aluminum, supra,* a case which closely parallels the instant proceeding, the U. S. Supreme Court held that employees have the right under Section 7 of the Act to walk off their jobs, without prior notice to their employer and without following established plant rules forbidding employees from leaving their work stations without permission, if their action is a means of protesting what they perceive to be intolerable working conditions. The general rule is that the protections of Section 7 do "not depend on the *manner* in which the employees choose to press the dispute, but rather on the *matter* that they are protesting," *Plastilite Corporation,* 153 NLRB 180, 184 (1965), enfd. in pertinent part 375 F.2d 343 (8th Cir. 1967). Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected. As we stated in *Plastilite Corporation, supra,* "we must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the labor dispute. When a labor dispute exists, the Act allows employees to engage in concerted activity which they decide is appropriate for their mutual aid and protection, including a strike, unless . . . that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions." Whether the protested working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act, *International Van Lines,* 177 NLRB 353, 364 (1969); *Du-Tri Displays, Inc., supra; Modern Carpet Industries, Inc.,* 236 NLRB 1014 (1977), enfd. 611 F.2d 811 (10th Cir. 1979); *Pen Pekin Corporation,* 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1970).

Nor does the fact that employees fail to make a specific demand to the employer automatically render their conduct unprotected. Particularly where the employees are not represented by a labor organization which may speak to the employer on their behalf, "if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1)," *South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977); *N.L.R.B.* v. *Washington Aluminum, supra.*

Applying these principles to the instant case, we find that the 11 employes who clocked out to protest the presence of ammonia fumes in their work environment were clearly engaged in protected concerted activity. The presence of ammonia fumes in the work environment is, obviously, a working condition. The uncontested testimony of these employees demonstrates that their walkout was caused by concern over these fumes and their desire to see that "something might be done about it." The record in this case permits no doubt that their concerns were made known to Respondent. The Administrative Law Judge was seemingly of the view that the employees were not entitled to leave the plant because such action was in derogation of an existing plant rule and because Respondent had provided a procedure which adequately dealt with the problem. We disagree.

Of particular significance here is the fact that Respondent's employees are not represented by a labor organization or covered by a collective-bargaining agreement containing a "no-strike" clause. The fact that Respondent has unilaterally established and promulgated a rule restricting this activity is insufficient to deprive employees of a statutory right. Nor can it be said that because Respondent

has provided an alternative solution to the problem, the employees are required to accept it. No matter how reasonable the alternative might seem, if the employees choose to exercise their statutory rights, they can not be penalized for doing so.

We must also reject the Administrative Law Judge's conclusion that the employees' walkout was unprotected because the Occupational Safety and Health Administration found Respondent's plant not to violate its regulations, or because another statutory scheme might have afforded the employees some form of relief. The rights guaranteed to employees under the National Labor Relations Act are distinct from and are not subordinate to the provisions of the Occupational Safety and Health Act, *Du-Tri Displays, supra.* To hold otherwise might seriously diminish the rights of employees to engage in concerted activity for their mutual aid and protection and would constitute an abdication of the role that Congress has assigned to the National Labor Relations Board in protecting those rights.

Accordingly, for the reasons stated above, we find that Respondent violated Section 8(a)(1) of the Act by discharging the 11 employees because they engaged in a strike over working conditions. We also find that Plant Manager A. J. Schopp's statement to employees that "If you clock out and go home today, don't come back tomorrow . . . consider yourself fired," was a threat of discharge for engaging in protected activity and therefore in violation of Section 8(a)(1) of the Act.[3] [[3] See *Vic Tanney International,* 232 NLRB 353 (1977), enfd. 622 F.2d 237 (6th Cir. 1980).]

Lastly, we agree with the General Counsel that the 11 discharged employees are entitled to full and immediate reinstatement and backpay. Employees who are unlawfully

discharged while engaged in a lawful strike are entitled to backpay from the date of the discharge until the date that they are offered reinstatement. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enforcement denied on other grounds, 612 F.2d 6 (1st Cir. 1979). The Administrative Law Judge noted that the 11 discharged employees did not request reinstatement. However, under our current decisions, there is no requirement that employees who are unlawfully discharged during a protected strike must request reinstatement; "since it is the employer who has acted unlawfully in discharging the employee, the burden is on that employer to undo its unfair labor practice by offering immediate reinstatement to the employee, and by reimbursing the employee for all losses suffered from the date of its discriminatory action," *Abilities and Goodwill, Inc., supra.*

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that on September 11, 1980, Respondent unlawfully threatened its employees with discharge for engaging in a lawful strike, we shall order that it cease and desist from such unlawful conduct.

Having found that, on September 11, 1980, Respondent unlawfully discharged 11 of its employees[4] [[4] The 11 unlawfully discharged employees are: Susan Awe, Naomi Best, Margaret Bressie, Mary Briscoe, Karen Harding, Joyce Himmelsbach, Betty Leyerle, Georgia Lourance, Sharon Peine, Sharon Teuton, and Anna Travis.] for engaging in a lawful strike over working conditions and

has thereafter refused and failed to offer these employees full and immediate reinstatement, we shall order that it cease and desist from such unlawful conduct and offer the 11 unlawfully discharged employees full and immediate reinstatement to their jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. We shall also order that Respondent make whole these 11 employees for any loss of pay they may have suffered because of Respondent's unlawful discharge, by payment to them of a sum equal to that which they would have earned from the date of their discharge until they are reinstated or receive valid offers of reinstatement, less any net interim earnings. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977)[5] [[5] See, generally, *Isis Plumbing & Heating Co,* 138 NLRB 717 (1962). In accordance with his dissent in *Olympic Medical Corporation,* 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.]

Here followed the conclusions of law and order of the NLRB in detail.

Contentions of Respondent Tamara

Tamara in its Cross Petition for Review of the Decision and Order of the NLRB and in its Opening Brief in this Court makes the following contentions:

A. The conduct resulting in the disciplinary action on September 11, 1980, did not constitute "protected concerted activity."

B. The NLRB erred in refusing to defer or to accommodate the provisions of the Occupational Safety and Health Act (OSHA), promulgated OSHA standards, and the standards of the LMRA (Labor Management Relations Act).

C. The remedial order of the NLRB is contrary to law.

D. The finding of the NLRB of a violation of Section 8(a)(1) is contrary to law.

Decision Granting Application For Enforcement of Order of NLRB

After considering the briefs, arguments and the record, including the transcript of the hearing before the ALJ, we conclude that the application of the NLRB for an order enforcing its Decision and Order, quoted above, shall be granted.

Jurisdiction

This Court has jurisdiction of the issues under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the alleged unfair practices occurred in Missouri.

Discussion of Contentions of Respondent

A.

Tamara first contends that the NLRB erred in concluding from the uncontroverted facts that the walkout of the eleven employees was concerted activity (or strike) protected by Section 7 of the Act, 29 U.S.C. § 157. Tamara contends in detail that this conclusion of the NLRB is based on an erroneous "subjective standard" to determine whether an "employee safety" protest is protected, rather than whether the "protest" activity was directed to "actual or objectively perceived

danger" in the workplace. Further, Tamara argues that Section 7 protection of "safety protest" matters is limited to circumstances, said to be absent in this case, in which the protesting employees had no other alternative but to perform work perceived to be dangerous, or under conditions perceived to be dangerous.

Next Tamara contends that the NLRB erred in failing to balance and accommodate the employees' rights of protest against the claimed superior legitimate interests of Tamara to conduct business with loyalty of the employees, and without harassment or other disruptive conduct.

These contentions and arguments are lacking in merit under the controlling decisions of the Supreme Court of the United States in *National Labor Relations Board* v. *Washington Aluminum Co.,* 370 U.S. 9, 82 S.Ct. 1009, 8 L.Ed.2d 298 (1962), and of this Court in *First National Bank of Omaha* v. *National Labor Relations Board* (C.A. 8 1969) 413 F.2d 921. The following quotations from the opinion of the Supreme Court of the United States in *National Labor Relations Board* v. *Washington Aluminum Co., supra,* demonstrate that the NLRB did not err in concluding that the walkout of the eleven employees of Tamara was concerted activity protected under Section 7 of the Act unless forbidden by other lawful prohibitions of the Occupational Safety and Health Act or of the Labor Management Relations Act:

> The Court of Appeals . . . refused to enforce an order of the [NLRB] directing respondent . . . to reinstate and make whole seven employees whom the company had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in.

* * * * *

We cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of §7 might place burdens on employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop.

* * * * *

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in §2(9) of the Act which declares that it includes "any controversy concerning terms, tenure or *conditions* of *employment*. . . ." The findings of the Board . . . show a running dispute between the machine shop employees and the company over the heating of the shop on cold days - a dispute which culminated in the decision of the employees to act concertedly in an effort to force the com-

pany to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has been long settled that the reasonableness of the workers' decision to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. . . .

* * * * *

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant.

* * * * * *

It is of course true that §7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of §7 to activities characterized as "indefensible" because they were found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities. The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted acitivites by employees for the purpose of trying to protect

> themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

The striking similarities of the facts in the *Washington Aluminum Co.* case, *supra,* and in this case make it clear that the NLRB did not err in concluding that the walkout in this case was concerted activity protected by Section 7 of the Act.

An opinion by Judge Heaney, for this Court, following the *Washington Aluminum Co.* case, *supra,* emphasizes the importance of considering the lack of representation of the employees, as in this case, by a labor organization and the absence of a collective bargaining agreement. *First National Bank of Omaha* v. *National Labor Relations Board* (C.A.8 1969) 413 F.2d 921 at 926.

The many authorities relied on by Tamara in support of the foregoing contentions are either not in point or distinguishable.

We examine next the contentions of Tamara concerning the Occupational Safety and Health Act (OSH Act) and the Labor Management Relations Act (LMRA).

B.

Tamara further contends that the NLRB erred in ignoring (1) the provisions and standards of the OSH Act, 29 U.S.C. §§ 651 *et seq.*, and (2) Section 502 of the LMRA, 29 U.S.C. § 143. These contentions will be discussed separately.

1. The OSH Act and Standards

Tamara complains of the failure of the NLRB to cite and apply the OSH Act and standards promulgated thereunder, 29

C.F.R. §§ 1910.1000(a)(2) and 1977.12, as prohibiting the action of the eleven employees in walking off the job, particularly in the absence of a reasonable apprehension of death or serious injury by objective evidence, and in the absence of no choice other than a refusal to work while exposed to death or serious injury. This complaint of Tamara is without merit under the controlling decision of *Whirlpool Corporation* v. *Marshall*, 445 U.S. [illegible] 100 S.Ct. 883, 63 L.Ed.2d 154 (1980). In denying contentions similar to those of Tamara, the Supreme Court of the United States said (445 U.S. 1 at 8-11, 100 S.Ct. 883 at 888-890, 63 L.Ed.2d 154 at 161-163):

> The Act itself creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace, OSHA must conduct an inspection. 29 USC § 657(f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act, 29 USC § 662(a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. § 662(c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. § 662(a).
>
> To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the ex-

ercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 USC § 657(f)(1). He is given a limited right to assist the OSHA inspector in inspecting the workplace, §§ 667(a)(2), (e), and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See § 660(c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. § 662(d).

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee

> reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.
>
> Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 USC § 657(g)(2), and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer. (Footnotes omitted.)

The regulation, 29 C.F.R. § 1977.12, providing this right to employees in paragraph (b)(2) is quoted in full in footnote 3 of *Whirlpool Corporation* v. *Marshall, supra.* The regulation, and particularly the protection it affords employees who in good faith and with reasonable apprehension of death or serious bodily injury refuse to expose themselves to dangerous conditions, were found to be valid.

We conclude that the NLRB was not required to deny relief because of the existence of the OSH Act. The employees had sought relief in 1979 and in July, August and September 1980 under the OSH Act without relief from the conditions that continued repeatedly until the walkout. Thus the NLRB properly affirmed the findings of these facts of the ALJ. The NLRB also found that the ammonia fumes caused the employees to experience nausea, burning sensations in their noses, headaches, tightness in their chests and difficulty in breathing. These symptoms and the apprehension of injury were reasonable and objectively proven in light of the commonly known effects of ex-

posure to ammonia. See part of the description of ammonia in *The New Columbia Encyclopedia* (Columbia University Press 1975) at page 92 as follows:

> *ammonia,* chemical compound, NH_3, colorless gas that is about one half as dense as air at ordinary temperatures and pressures. It has a characteristic pungent, penetrating odor. It is extremely soluble in water; one volume of water dissolves about 1,200 volumes of the gas at O°C (90 grams of ammonia in 100 cc of water), but only about 700 volumes at room temperature and still less at higher temperatures. The solution is alkaline because much of the dissolved ammonia reacts with water, H_2O, to form ammonium hydroxide, NH_4OH, a weak base. The ammonia sold for household use is a dilute water solution of ammonia in which ammonium hydroxide is the active cleansing agent. It should be used with caution since it can attack the skin and eyes. The vapors are especially irritating—prolonged exposure and inhalation cause serious injury and may be fatal.

The OSH Act is not designed to provide relief in these urgent circumstances. See the sometimes protracted deliberate proceedings possible under the unusual procedures of the OSH Act, described in *Donovan, Secretary of Labor* v. *Anheuser-Busch, Inc.* (C.A.8 1981) 666 F.2d 315 at 323-324.

The NLRB did not err in concluding that the rights guaranteed to these employees by the Act are superior to the provisions of the OSH Act.

Nor does the failure of the employees to expressly demand specific corrective action affect the rights of these unorganized employees. As the NLRB found, the repeated complaints of the employees under the OSH Act and the experiences on the day of the walkout made evident the desires of the employees for action by Tamara.

2. Section 502 of the LMRA

Tamara argues that under Section 502 of the LMRA, 29 U.S.C. § 143, "objective evidence" and "good faith belief" of "abnormally dangerous conditions of work" are required to support a finding of activity protected by Section 7 of the Act; and that this was not considered by the NLRB in this action. To the extent required by Section 502, the facts found by the NLRB and the ALJ were supported by objective evidence, and good faith belief was proven.

Section 502 (29 U.S.C. § 143) is as follows:

> **Saving provision**
>
> Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act [LMRA].

This provision does not modify Section 7 of the Act and is not relevant to the action of the NLRB in this case. The purpose of Section 502 was described, by the Supreme Court of the United States, in footnote 29 of *Whirlpool Corporation* v. *Marshall, supra,* as follows:

> Similarly, Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of

> employment of such employee or employees [shall not] be deemed a strike." The effect of this section is to create an exception to a no-strike obligation in a collective bargaining agreement *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 385, 38 L.Ed.2d 583, 94 S.Ct. 629.
>
> The existence of these statutory rights also makes clear that the Secretary's regulation [29 C.F.R. § 1977.12(b)(1)] does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health. See also 29 C.F.R. § 1977.18 (1979).

There was no collective bargaining agreement in this case, to make Section 502 applicable.

C.

Remaining Contentions of Tamara

Except for the complaint about the remedy, the remaining contentions of Tamara that the NLRB erred in its Decision and Order are determined to be lacking in merit by disposition of its primary contentions A and B above.

The remedy of the NLRB requiring reinstatement of the employees and awarding back pay was authorized, although the employees did not request reinstatement or offer to return to work. *Abilities and Goodwill, Inc.,* 241 NLRB, No. 5, 27 (1979), reversed on other grounds (C.A.1 1979) 612 F.2d 6; *National Labor Relations Board* v. *Lyon & Ryan Ford, Inc.* (C.A.7 1981) 647 F.2d 745 at 755-757, *cert. denied,* ____ U.S. ____, 102 S.Ct. 391, 70 L.Ed.2d 209; *National Labor Relations Board* v. *Mars Sales & Equipment Co.* (C.A.7 1980) 626 F.2d 567 at 573-575; *National Labor Relations Board* v. *Trident Seafoods Corp.* (C.A.9 1981) 642 F.2d 1148 at 1149-1150.

Conclusion

For the foregoing reasons the application of the NLRB for enforcement of its Decision and Order is hereby, GRANTED.

APPENDIX B

258 NLRB No. 180 D—8052
Old Monroe, MO.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 14—CA—14248

Tamara Food, Inc.

and

Sharon Teuton, an Individual

DECISION AND ORDER

On April 21, 1981, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm only so much of that Decision as is consistent with this Decision and Order.

The complaint in this proceeding alleges that Respondent violated Section 8(a)(1) of the Act by unlawfully threatening to discharge and discharging 11 employees for engaging in a strike over unhealthy working conditions. The Administrative Law

Judge dismissed the complaint on the ground that the activity of the 11 employees, although concerted, was not protected by Section 7 of the Act. As further explained below, we find that the Act protects the rights of employees to strike over what they honestly believe to be unsafe and unhealthy working conditions, and we find, consequently, that Respondent's threat of discharge and its discharge of these employees for exercising those rights violated Section 8(a)(1).[1]

Respondent, which is engaged in the business of preparing and selling frozen foods, uses an ammonia refrigeration system to freeze its products. On several occasions ammonia gas from the refrigeration system leaked into the production area where Respondent's employees work. Employees testified without contradiction that the ammonia fumes had caused them to experience nausea, burning sensations in their noses and throats, headaches, tightness in their chests, and difficulty in breathing.

Respondent recognized the problem of occasional ammonia leaks and had unilaterally promulgated work rules to be followed in such situations.[2] Under these rules, sick leave was to be granted automatically to any employee upon request; any employee who believed that an unsafe or unhealthy condition existed at the plant would be permitted to leave his or her work station and remain in the lunchroom or directly outside the

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[1] The Administrative Law Judge failed to make a specific finding on the General Counsel's allegation, contained in par. 5 of the complaint, that Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge employees who clocked out of the plant to protest their working conditions. The record shows that this issue was fully and fairly litigated at the hearing. Accordingly, we consider this issue to be properly before us.

[2] Respondent's employees are not represented by a labor organization and Respondent's plant rules, therefore, are not part of any collective-bargaining agreement.

plant, with full pay, until the condition was corrected; and any employee who clocked out prior to the end of the shift would be discharged.

On the morning of September 11, 1980, 15 or 20 minutes into the start of the 7 a.m. shift, the employees in the production area smelled ammonia leaking from the freezer system and began to feel its noxious effects. The employees, on their own initiative, left the production area and congregated in the lunchroom. Supervisor Helen Bury was then informed of the leakage and the employees were told to wait in the lunchroom until the problem was corrected.

Approximately 45 minutes later, Supervisor Bury informed the employees that the ammonia leakage had been stopped and directed them back into the production area. When the employees returned to the production area they found that it still contained ammonia fumes and was, in fact, worse then before. After working for 10 or 15 minutes, the employees retreated to the lunchroom for a second time and again reported the problem to Supervisor Bury. A number of employees went outside the plant for fresh air. Shortly thereafter, the employees were again assured that the ammonia problem had been corrected and were directed to return to the production area.

Upon their return to work for a third time, the employees continued to feel the harmful effects of the ammonia fumes. At this point, the entire complement of employees left their work stations. Many of the 50 employees began to clock out.

Supervisor Bury tried to convince the employees to stay at the plant and told them that they could remain in the lunchroom and be paid for waiting until the ammonia problem was corrected. Several employees objected, however, and said that they were not going to wait at the plant. When Plant Manager A. J. Schopp noticed that employees were waiting in line to clock out,

and was told that several employees had already done so, he told them that they had "better go clock back in" and that those who clocked out should not "bother coming in tomorrow." Schopp further stated that any employees who left work should consider themselves fired.

After Schopp's statement that clocking out would mean discharge, most of the employees decided to remain at the plant. Some of those who had already clocked out, clocked back in. However, 11 employees remained clocked out and left the plant, for which they were discharged.

The Administrative Law Judge found, and we agree, that the action of these 11 discharged employees was clearly "concerted activity" within the meaning of the Act. However, unlike the Administrative Law Judge, we find that the conduct was also clearly protected.

It has long been established that Section 7 of the Act protects the rights of employees to engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions. *N.L.R.B.* v. *Washington Aluminum Company,* 370 U.S. 9 (1962); *Union Boiler Company,* 213 NLRB 818 (1974); *Du-Tri Displays, Inc.,* 231 NLRB 1261 (1977); *F. R. Carpenter Co.,* 252 NLRB No. 5 (1980); *Service Machine & Shipbuilding Corp.,* 253 NLRB No. 88 (1980).

In *N.L.R.B.* v. *Washington Aluminum, supra,* a case which closely parallels the instant proceeding, the U. S. Supreme Court held that employees have the right under Section 7 of the Act to walk off their jobs, without prior notice to their employer and without following established work rules forbidding employees from leaving their work stations without permission, if their action is a means of protesting what they perceive to be intolerable working conditions. The general rule is that the protections of Section 7 do "not depend on the *man-*

ner in which the employees choose to press the dispute, but rather on the *matter* that they are protesting," *Plastilite Corporation,* 153 NLRB 180, 184 (1965), enfd. in pertinent part 375 F.2d 343 (8th Cir. 1967). Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected. As we stated in *Plastilite Corporation, supra,* "we must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the labor dispute. When a labor dispute exists, the Act allows employees to engage in concerted activity which they decide is appropriate for their mutual aid and protection, including a strike, unless . . . that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions." Whether the protested working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act, *International Van Lines,* 177 NLRB 353, 364 (1969); *Du-Tri Displays, Inc., supra; Modern Carpet Industries, Inc.,* 236 NLRB 1014 (1977), enfd. 611 F.2d 811 (10th Cir. 1979); *Ben Pekin Corporation,* 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1970).

Nor does the fact that employees fail to make a specific demand to the employer automatically render their conduct unprotected. Particularly where the employees are not represented by a labor organization which may speak to the employer on their behalf, "if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1)," *South Central Timber Development, Inc.,* 230 NLRB 468, 472 (1977); *N.L.R.B.* v. *Washington Aluminum, supra.*

Applying these principles to the instant case, we find that the 11 employees who clocked out to protest the presence of ammonia fumes in their work environment were clearly engaged in protected concerted activity. The presence of ammonia fumes in the work environment is, obviously, a working condition. The uncontested testimony of these employees demonstrates that their walkout was caused by concern over these fumes and their desire to see that "something might be done about it." The record in this case permits no doubt that their concerns were made known to Respondent. The Administrative Law Judge was seemingly of the view that the employees were not entitled to leave the plant because such action was in derogation of an existing plant rule and because Respondent had provided a procedure which adequately dealt with the problem. We disagree.

Of particular significance here is the fact that Respondent's employees are not represented by a labor organization or covered by a collective-bargaining agreement containing a "no-strike" clause. The fact that Respondent has unilaterally established and promulgated a rule restricting this activity is insufficient to deprive employees of a statutory right. Nor can it be said that because Respondent has provided an alternative solution to the problem, the employees are required to accept it. No matter how reasonable the alternative might seem, if the employees choose to exercise their statutory rights, they can not be penalized for doing so.

We must also reject the Administrative Law Judge's conclusion that the employees' walkout was unprotected because the Occupational Safety and Health Administration found Respondent's plant not to violate its regulations, or because another statutory scheme might have afforded the employees some form of relief. The rights guaranteed to employees under the National Labor Relations Act are distinct from and are not subordinate to the provisions of the Occupational Safety and Health Act, *Du-Tri Displays, supra.* To hold otherwise might seriously diminish the rights of employees to engage in concerted activity for their mutual aid and protection and would constitute an ab-

dication of the role that Congress has assigned to the National Labor Relations Board in protecting those rights.

Accordingly, for the reasons stated above, we find that Respondent violated Section 8(a)(1) of the Act by discharging the 11 employees because they engaged in a strike over working conditions. We also find that Plant Manager A. J. Schopp's statement to employees that "If you clock out and go home today, don't come back tomorrow . . . consider yourself fired," was a threat of discharge for engaging in protected activity and therefore in violation of Section 8(a)(1) of the Act.[3]

Lastly, we agree with the General Counsel that the 11 discharged employees are entitled to full and immediate reinstatement and backpay. Employees who are unlawfully discharged while engaged in a lawful strike are entitled to backpay from the date of the discharge until the date that they are offered reinstatement. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enforcement denied on other grounds, 612 F.2d 6 (1st Cir. 1979). The Administrative Law Judge noted that the 11 discharged employees did not request reinstatement. However, under our current decisions, there is no requirement that employees who are unlawfully discharged during a protected strike must request reinstatement; "since it is the employer who has acted unlawfully in discharging the employee, the burden is on that employer to undo its unfair labor practice by offering immediate reinstatement to the employee, and by reimbursing the employee for all losses suffered from the date of its discriminatory action," *Abilities and Goodwill, Inc., supra.*

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we

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[3] See *Vic Tanney International*, 232 NLRB 353 (1977), enfd. 622 F.2d 237 (6th Cir. 1980).

shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that on September 11, 1980, Respondent unlawfully threatened its employees with discharge for engaging in a lawful strike, we shall order that it cease and desist from such unlawful conduct.

Having found that, on September 11, 1980, Respondent unlawfully discharged 11 of its employees[4] for engaging in a lawful strike over working conditions and has thereafter refused and failed to offer these employees full and immediate reinstatement, we shall order that it cease and desist from such unlawful conduct and offer the 11 unlawfully discharged employees full and immediate reinstatement to their jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. We shall also order that Respondent make whole these 11 employees for any loss of pay they may have suffered because of Respondent's unlawful discharge, by payment to them of a sum equal to that which they would have earned from the date of their discharge until they are reinstated or receive valid offers of reinstatement, less any net interim earnings. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

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[4] The 11 unlawfully discharged employees are: Susan Awe, Naomi Best, Margaret Bressie, Mary Briscoe, Karen Harding, Joyce Himmelsbach, Betty Leyerle, Georgia Lourance, Sharon Peine, Sharon Teuton, and Anna Travis.

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 717 (1962).

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Conclusions of Law

1. The Respondent, Tamara Foods, Inc., Old Monroe, Missouri, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act on September 11, 1980, by threatening its employees with discharge if they engaged in a strike over working conditions and by discharging employees who had engaged in a lawful strike.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby Orders that the Respondent, Tamara Foods, Inc., Old Monroe, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act by: threatening its employees with discharge if they engage in a lawful work stoppage and discharging employees because they engaged in such protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer Susan Awe, Naomi Best, Margaret Bressie, Mary Briscoe, Karen Harding, Joyce Himmelsbach, Betty Leyerle, Georgia Lourance, Sharon Peine, Sharon Teuton, and Anna Travis immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent

positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, replacement employees, and make them whole for their loss of earnings, with backpay to commence on September 11, 1980, with interest thereon, to be computed as described in the remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at Respondent's plant at Old Monroe, Missouri, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. September 30, 1981.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT threaten employees with discharge for engaging in work stoppages over working conditions.

WE WILL NOT discharge employees for engaging in work stoppages over working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Susan Awe, Naomi Best, Margaret Bressie, Mary Briscoe, Karen Harding, Joyce Himmelsbach, Betty Leyerle, Georgia Lourance, Sharon Peine, Sharon Teuton, and Anna Travis immediate and full reinstatement to their former jobs or, in the event such positions no longer exist, to substantially equivalent

employment, without prejudice to their seniority and other rights and privileges previously enjoyed.

WE WILL make these employees whole for any loss of pay or benefits which they suffered by reason of their unlawful discharge, with interest.

TAMARA FOODS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, 210 Tucker Boulevard North, Room 448, St. Louis, Missouri 63101, Telephone 314-425-4361.

JD-198-81
Old Monroe, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 14-CA-14248

Tamara Foods, Inc.

and

Sharon Teuton, An Individual

Gail Donnelly Bader, Esq.,
for the General Counsel.
Gerald Tockman, Esq., of
St. Louis, MO, for Respondent.

DECISION

Statement of the Case

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was held on February 25, 1981, in St. Louis, Missouri on complaint issued December 15, 1980, alleging violations of Section 8(a)(1) of the Act. Respondent's answer denies any violation of the Act.

At issue is whether Respondent unlawfully discharged 11 employees who clocked out before the end of their shift to protest allegedly unhealthy working conditions.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

The complaint alleges, the answer admits and I find that Respondent, engaged in the preparation of frozen food products, with annual interstate shipments in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. The Unfair Labor Practices

The relevant facts are simple and essentially undisputed.

Respondent, in the preparation of frozen onion rings and mushrooms, uses an ammonia refrigeration system. From time to time, ammonia has leaked into the atmosphere of the production areas, causing temporary respiratory discomfort. In addition, the processing of the onions temporarily causes tearing. At all relevant times, there has been a ventilation system in the work areas and an evacuation plan, both of which meet the standards imposed by the Department of Labor's Occupational Safety and Health Administration.

The following employment policies, fully understood by the employees, were in effect at all relevant times:

1. Sick leave would be granted automatically to any employee upon request.

2. Any employee who believed that there existed an unsafe or unhealthy condition at the plant was permitted to leave the work station and remain in the lunchroom or outside the plant, with full pay, until the condition was corrected.

3. Any employee who otherwise clocked out prior to the end of the shift would be discharged.

On September 11, 1980, shortly after commencement of the shift at 7:00 a.m., a number of employees smelled ammonia, left their work stations and proceeded to the lunchroom which

was free of ammonia fumes. Shortly thereafter, supervisor Bury called the employees back to the production area. Again, the employees smelled ammonia and again they returned to the lunchroom. Three employees went outside for fresh air. Supervisor Bury again called the employees back to work, reporting that the condition had been corrected. Once again the employees detected ammonia and, for the third time, left their stations. Of the approximately 50 employees in the production area, all remained at the plant, except 11 who clocked out at approximately 9:18 a.m. All employees were assured by plant manager Schopp that, consistent with Company policy, they could "sit around on their butts" and be paid for the full shift. He also reminded them that they would be discharged if they clocked out.

The 11 employees who did clock out were discharged for that reason alone. None of the 11 employees thereafter requested reinstatement; each testified they had intended to report to work the following day.

Based on their testimony at this hearing and at unemployment compensation proceedings, I find that none of the 11 had left the plant because of illness, none had requested sick leave[1] and none had sought medical attention thereafter. One other employee, not involved herein, *had* requested and been granted sick leave earlier that morning. The 11 employees proceeded that afternoon to file claims for unemployment compensation and complaints with the Occupational Safety and Health Administration and certain state agencies. Their reason for clocking out prior to the end of the shift was best stated by employee Bressie:

> . . . we all decided that if we would go in a group, that something might be done about it instead of just, you know, leaving by yourself. (Tr. 163)

[1] The testimony of some that they sought to take sick leave is not credited, as inconsistent with (a) their testimony in unemployment compensation proceedings and (b) their theory in the case that they engaged in strike activity.

At no time, before or after they clocked out, did the employees present any demands to Respondent concerning working conditions.

On July 19, 1979, 14 months prior to the incident which gave rise to this proceeding, the Occupational Safety and Health Administration, acting on an employee complaint of ammonia leaks, conducted an on-site inspection of the production areas and refrigeration system and interviewed a number of employees. No environmental violations were found and it was recommended that Respondent remove employees from affected areas when vapors were present. Thereafter, such a policy was implemented by Respondent. By letter dated August 10, 1979, the complaining employee was informed by OSHA that "no alleged violations of Safety and Health Regulations were found as referenced in your complaint of ammonia leaking from the new freezer."

During the period of September 5-11, 1980, acting on a late August or early September 1980 complaint of one of the employees involved in this case, OSHA conducted another on-site inspection of the production areas and refrigeration system.[2] Again, the environment was found to be safe, the ventilation system was found to be adequate and, based on the compliance officer's interviews with management and employees, "the procedure for handling ammonia leaks and evacuation procedures appeared to be adequate." No violations were detected and the complaining employee was so notified by OSHA letter dated September 24, 1980.

Counsel for the General Counsel's theory is straightforward: The 11 employees, in protesting working conditions, were engaged in protected concerted activity, despite Respondent's

---

[2] Three other conditions, also alleged by the employee to be unsafe and unhealthy — smoke from frylines, faulty electrical equipment and wiring, and clogged toilets — were inspected and no violations were found.

compliance with OSHA standards and its policy to continue to pay employees who leave their work areas because of a belief that conditions are unhealthy and that, as economic strikers,[2] they may be replaced but not discharged. In support thereof, she relies principally on N.L.R.B. v. *Washington Aluminum Co.*, 370 U.S. 9, 50 LRRM 2235 (1962).

For the reasons set forth herein, I conclude that the activity, although clearly concerted, was unprotected under Section 7 of the Act.

In *Washington Aluminum*, the Supreme Court recognized the need, under Section 7, to balance rights of employees with the employer's right to expect a basic loyalty in the performance of their assigned work. The Court said:

> It is of course true that §7 does not protect all concerted activities . . . this Court's more recent pronouncement . . . denied the protection of Section 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities.
>
> 50 LRRM 2238-9.

This need for accommodation, recently restated in *Sullair P.T.O. Inc.*, v. *N.L.R.B.*, ____ F.2d ____, 106 LRRM 2705,

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[2] But see, *Brown & Root, Inc.* v. *N.L.R.B.*, 246 NLRB No. 7, enf'd, ____ F. 2d ____, 106 LRRM 2391 (5th Cir., 1981), where the Board, under comparable facts, found that the work stoppage did not amount to a strike, but rather was a protected concerted activity that did not amount to a general work refusal. In any event, for purposes of this case, it is unnecessary to decide anything more than whether the activity was protected and concerted.

2708 (7th Cir., 1981) ("The National Labor Relations Act is directed toward recognition of the legitimate rights of both employer and empoyees, 29 U.S.C. §141(a). There must be room in the law for a right somewhere, sometime, at some stage, to free itself of continuing, unproductive, internal and improper harassment."), has been long recognized by the General Counsel, the Board and the Courts.

For example, in an advice memorandum in *Economy Tank Line,* 99 LLRM 1198 (1978), the Associate General Counsel stated:

> For an activity to be found protected, both the object and the conduct must be protected. Thus, where the object is protected, but the conduct is unprotected, the whole activity is unprotected.
>
> 99 LRRM at 1198.

He went on to find the employee's refusal to work, in violation of a no-strike agreement and in the absence of an abnormally dangerous condition, to be unprotected.

Similarly, for example, the Board, in *Serv-Air,* 162 NLRB 1369 (1967) considered questions of whether the activity was "inappropriate" and whether there were "over-riding business considerations", in its determination of whether the activity was protected; and, in *Mal Landfill Corp.,* 210 NLRB 167 (1974), it held unprotected the closing of gates by employees for purposes of forcing the employer to talk with them concerning safety conditions.

And the Courts of Appeals, for example, in *Shelley & Anderson Furniture Mfg., Co.* v. *N.L.R.B.* 497 F. 2d 1200 (9th Cir., 1974) considered the impact of the employee activity on the operation of the business and, in *Dobbs House, Inc.* v. *N.L.R.B.,* 325 F. 2d 53, (5th Cir., 1963), the mass departure of

waitresses during the dinner hour was held not a reasonable method of protesting the firing of a supervisor.[3]

Remaining, then, is a consideration of the circumstances of this case against the backdrop of *Washington Aluminum* and its progeny.

The 11 employees had no objective reason to fear that performance of their assigned task might result in personal harm. A safe workplace is not the equivalent of a risk-free one. To be unsafe, it must threaten employees with a significant risk of harm, *Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* ____ U.S. ____ 100 S.Ct. 2844 (1980). Ammonia leaks were quite infrequent and, while employees suffered discomfort, there is no evidence of actual illness and no evidence of any harmful effects of ammonia fumes. The refrigeration system and the Respondent's evacuation plan met all OSHA standards and employees were so advised in 1979 and again in September 1980. Significant is the fact that they were not compelled to remain in the vicinity of the fumes; their immediate assignments at the time of their untimely departure were to standby in the lunchroom or outside the plant to await repair of the equipment. There was, in fact, no risk of harm whatever to any production employee.

Moreover, the employees, as they had a right to do, already had initiated, under the Occupational Safety and Health Act, a complaint process which would lead to a Department of Labor compliance inspection. Previously, in 1979, an employee complaint of ammonia leaks resulted in an on-site inspection and a written opinion to the employee that no violations were

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[3] See also *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975) (concerted activity by a minority of represented employees to protest employment conditions is unprotected under the Act.)

detected. A second complaint, initiated only days prior to September 11, had rapidly brought to the plant another OSHA compliance officer and that inspection was in process on the very day that the 11 employees clocked out in order "that something might be done about [the ammonia fumes]." Unlike the seven employees of *Washington Aluminum* who were otherwise unrepresented and left to protect themselves from unsafe and unhealthy working conditions, these employees had sought and were receiving protection through the enforcement powers of the Department of Labor. Inexplicably, even though no imminent environmental hazards then existed, they chose to take matters into their own hands without awaiting the orderly process of a compliance inspection.

Finally, at no time before or after their "strike" did the employees present a demand to Respondent. To be protected, a concerted protest of working conditions under Section 7 of the Act necessarily must be accompanied by a demand made upon the employer before, after or at the time of the activity. *Washington Aluminum*, 50 LRRM at 2237. The reason is obvious: Section 7 protects the assertion of legitimate employee rights, capable of being remedied by an employer. Without such a demand, the activity of the employees here — a refusal to provide any services — is tantamount to a voluntary quit. It is difficult to perceive what the 11 striking employees hoped to accomplish here. They were not compelled to expose themselves to noxious fumes. They were not deprived of their wages, but rather were paid for remaining available at the plant on standby. They were not exposed to working conditions which failed to meet national health and safety standards. They offered no evidence that the production areas could have been made vapor-free. And they gave no clue as to what action might have been taken by Respondent to avoid this or any future work stoppage.

Taken singly or together, the circumstances compell the conclusion that the actions of the 11 employees in clocking out

before the end of the shift on September 11, 1980, were indefensible and thus unprotected, in that they demonstrated a gross disloyalty to their employer and were unnecessary for the protection of their legitimate concern for a safe and healthy workplace.

Upon the foregoing findings of fact, conclusions of law, and the entire record and, pursuant to Section 10(c), I hereby issue the following:

ORDER[4]

IT IS ORDERED that the complaint be, and the same hereby is, DISMISSED.

Dated at Washington, D.C., April 21, 1981.

/s/ William A. Gershuny
Administrative Law Judge

[4] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

United States Court of Appeals
For The Eighth Circuit
September Term, 1982

81-2318

National Labor Relations Board,
Petitioner,

v.

Tamara Foods, Inc.,
Respondent.

Application for Enforcement of
Order of the
National Labor Relations Board

JUDGMENT
(Filed Nov. 17, 1982)

BEFORE: HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge and BECKER, Senior District Judge
and BECKER, Senior District Judge

On November 17, 1982, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby, ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Tamara Foods, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order.

/s/ Robert D. St. Vrain
Clerk, United States Court of
Appeals for the Eighth Circuit

APPENDIX D

United States Court of Appeals
For The Eighth Circuit

81-2318

September Term 1982

National Labor Relations Board,
Petitioner,

v.

Tamara Foods, Inc.,
Respondent.

Application for Enforcement of
Order of the
National Labor Relations Board

The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

December 14, 1982

APPENDIX E

Statues Involved

Labor Mangement Relations Act
(61 Stat. 136, 73 Stat. 519
29 U.S.C. Sec. 141, et seq.)

Sec. 7, U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a)(1), 29 U.S.C. § 158(a)(1):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . .

Occupational Safety and Health Act
(84 Stat. 1590, 29 U.S.C.
Sec. 651, et seq.)

Sec. 2, 29 U.S.C. §651 (b):

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

Sec. 11(c)(1), 29 U.S.C. §660(c)(1):

(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is

about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

Regulation of the Secretary of Labor

29 C.F.R. §1977.12, 38 Fed. Reg. 2681, 2683 (1973), as corrected 38 Fed. Reg. 4577 (1973):

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances,

therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

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Office-Supreme Court, U.S.
FILED
APR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1521

In the Supreme Court of the United States

OCTOBER TERM, 1982

TAMARA FOODS, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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EDWARD S. DORSEY
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Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that petitioner's employees were engaged in concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157, when they walked out to protest the presence of ammonia fumes in their work area.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1521

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 692 F.2d 1171. The decision and order of the National Labor Relations Board (Pet. App. A-28 to A-48) are reported at 258 N.L.R.B. 1307.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-49) was entered on November 17, 1982. A petition for rehearing was denied on December 14, 1982 (Pet. App. A-50). The petition for a writ of certiorari was filed on March 11, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(a).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A-51.

STATEMENT

1. Petitioner Tamara Foods (the Company) produces frozen onion rings and mushrooms for wholesale distribution. The freezers used in this process utilize ammonia as the refrigerant (Pet. App. A-29). Several times in early 1979 the freezer's cooling system developed leaks that released ammonia into the production areas outside the plant where about 50 employees worked. These fumes caused the employees to experience nausea, burning sensations in their noses and throats, headaches, tightness in their chests, and difficulty in breathing (Pet. App. A-41).

In response to an employee complaint about these leaks, the Occupational Safety and Health Administration (OSHA) conducted an on-site inspection at the plant on July 19, 1979. The on-site inspection revealed that there were no ammonia leaks at the time of the inspection but that there had been a leak or two before, which the Company had repaired. The inspection report indicated that there were low levels of ammonia in the plant atmosphere, that these levels were within OSHA's standards, but that ammonia levels could become high enough during a leak to cause irritation to employees. The report also noted that accurate measurement of the ammonia concentration resulting from a leak was difficult because the ammonia fumes would have dissipated by the time an OSHA inspector could get to the plant after a leak. Based on these factors, the OSHA inspector recommended that, as long as leaks continued, the Company should remove employees who experienced discomfort, at least until the vapors had dissipated (Pet. App. A-43; RX. 4).[1]

---

[1] "RX." refers to exhibits introduced by the Company at the hearing before the Administrative Law Judge. "Tr." refers to the transcript of that hearing.

Leaks remained a problem during the next year. Often employees would be able to work through the duration of a leak, but at other times the employees would evacuate the production areas of the plant in accordance with rules promulgated by the Company. Under these rules, if employees decided to evacuate, the Company would continue to pay them at their normal rate until the leak was repaired and it was safe to reenter the plant; sick leave would be granted automatically upon request; but employees who clocked out before the end of the shift would be discharged (Pet. App. A-41). In response to further employee complaints about several alleged safety problems, including frequent ammonia leaks, OSHA conducted additional on-site inspections in early September 1980. The inspector found no violations of OSHA regulations and concluded that the Company's procedure for handling ammonia leaks and evacuation appeared to be adequate (Pet. App. A-43).

Shortly after the 7:00 a.m. shift started work on September 11, 1980, the employees began to smell ammonia. They continued to work, but the smell of ammonia became much stronger. After several minutes, most of the employees were feeling sick and some were gagging. The employees, on their own initiative, evacuated the production area and went to the cafeteria. Once in the cafeteria, the employees discussed how bad the leak was and how the ammonia made them nauseous and hurt their chests and throats. A few employees went outside to get fresh air (Pet. App. A-30, A-41).

Plant manager A.J. Schopp arrived at the plant shortly after the employees had evacuated the production area. About 45 minutes later, Supervisor Helen ("Lou") Bury came to the cafeteria and ordered the employees back to work. The employees returned to their work stations and found that the ammonia in the air was just as bad as it had been when they had left. For about ten minutes the

employees attempted to work, but the ammonia fumes were too strong and the employees again were forced to evacuate. Upon returning to the cafeteria, the employees again discussed how difficult it was to breathe in the plant and how the ammonia fumes had made them sick. Some of the more seriously affected employees went outside for fresh air (Pet. App. A-30 to A-42).

About ten or fifteen minutes after the employees evacuated the production area for the second time, Bury again directed the employees to return to work. One of the employees, Sharon Teuton, asked Bury if the ammonia smell was gone, and Bury assured her that it was (Tr. 29). The employees then returned to their work stations inside the plant, but found that the ammonia fumes were just as strong, if not stronger, than they had been before. The employees tried to work, but soon they began to feel the ill effects of the ammonia and were again forced to evacuate the production areas of the plant (Pet. App. A-30, A-42).

A number of employees decided to clock out, go home, and return the following morning after the Company had an opportunity to fix the leak (Pet. App. A-30; Tr. 31-32, 72, 101). As employee Anna Travis headed for the time clock, Bury asked her where she was going. Travis explained that the ammonia fumes were too bad to work and that she was going to clock out (Tr. 101). Bury then went to the cafeteria, where a number of employees were waiting in line to clock out. After ascertaining that the employees intended to clock out, Bury asked them to wait for plant manager Schopp to come speak with them (Pet. App. A-30; Tr. 32, 108).

The employees were waiting in the cafeteria when Schopp arrived a few minutes later. Schopp asked what they were doing, and the employees responded that they were clocking out to go home because the ammonia fumes were so bad

in the plant (Pet. App. A-30; Tr. 32, 70). Schopp said that the Company would not require them to work while the fumes were bad and that they could remain in the cafeteria until the leak was repaired (Pet. App. A-42). Employee Anna Travis asked Schopp why the employees should believe him after they had twice been sent back into the plant before the leak was fixed. Schopp responded that Travis' question was impertinent and told the employees that if they left they should not bother coming back the next day (Pet. App. A-31; Tr. 71, 109). An employee asked Schopp what he meant, and Schopp replied that anyone who clocked out should consider himself fired. Several employees who previously had clocked out then clocked back in (Pet. App. A-31). Eleven employees believed it likely that the Company would again require them to reenter the plant before the leak was repaired and that the only way to be sure the leak was fixed was to clock out and go home. These employees left the plant, and the Company discharged them (Pet. App. A-31; Tr. 49-50, 72, 88, 109).

2. The Board, overruling the Administrative Law Judge, found that the employees' walkout constituted concerted activity protected by Section 7 of the NLRA, 29 U.S.C. 157. The Board therefore concluded that the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by discharging the employees who engaged in the walkout. The Board found that the walkout was rooted in the employees' concern over their repeated exposure to ammonia fumes and that Section 7 has long protected such employee efforts to protest what they perceive to be undesirable working conditions. The Board rejected petitioner's contentions that the protection of Section 7 is dependent upon the merits of the dispute, the reasonableness of the employees' choice of a method of protest, and the availability of alternative solutions to the employees' complaint. The Board also rejected petitioner's claim that the lack of a specific demand by the

employees removed them from the Act's protection, finding that the circumstances surrounding the walkout in this case adequately apprised the Company of the nature of the employees' concern. Finally, the Board held that the Company's unilaterally promulgated work rules did not curtail the scope of the protection afforded the employees by Section 7 (Pet. App. A-31 to A-34). The Board ordered petitioner to offer reinstatement to the discharged employees, to make them whole for the discrimination against them, and to post appropriate notices (Pet. App. A-34 to A-39).

3. The court of appeals affirmed, finding that the employees' concerns regarding the effects of repeated exposure to significant concentrations of ammonia fumes "were reasonable and objectively proven in light of the commonly known effects of exposure to ammonia" (Pet. App. A-23 to A-24); that despite repeated complaints by the employees about the ammonia leaks, the leaks "continued repeatedly until the walkout" (Pet. App. A-23); and that the employees' repeated complaints to OSHA and the events of the day of the walkout clearly had communicated to the Company "the desires of the employees for action" by the Company to eliminate the problem of recurrent leaks (Pet. App. A-24).

ARGUMENT

In *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), this Court held that a work stoppage by a group of unorganized employees to protest the employer's failure to supply adequate heat in the plant was concerted activity protected by Section 7 of the Act. Petitioner contends that the situation here is distinguishable in that the employees were not engaged in concerted activities protected by Section 7 because the Company did not require the employees to work under hazardous conditions, but instead permitted them to "wait with pay" in the cafeteria. The Board and the court below properly rejected this contention.

1. As an initial matter, the facts here did show that the employees were justified in believing that petitioner was requiring them to work under hazardous conditions. As shown in the Statement, ammonia leaks were a recurrent problem at the plant for more than a year before the employee walkout. Each leak necessarily entailed at least some exposure to ammonia fumes, and frequently the concentrations were sufficient to cause the employees severe physical discomfort — including nausea, burning sensations in their noses and throats, headaches, and difficulty in breathing. On the day of the walkout alone, petitioner twice ordered the employees back into the plant before the ammonia leak was fixed and before the fumes had dissipated. As a result, the employees were exposed three times in less than two hours to the fumes. Thus, regardless of petitioner's "wait with pay" policy, work at the plant involved potentially hazardous exposure to the noxious chemical.

2. In any event, the fact that an employer has unilaterally adopted rules pertaining to particular working conditions does not diminish the employees' Section 7 rights to protest what they consider to be unsatisfactory aspects of those conditions. Irrespective of the particular work rule, such a protest remains within the coverage of the statutory phrase "concerted activities for the purpose of * * * mutual aid or protection" (29 U.S.C. 157). In *Washington Aluminum Co., supra*, 370 U.S. at 16-17, for example, the Court held that a plant rule requiring permission before leaving work could not override the employees' Section 7 rights to walk off the job to protest the inadequate heat in the plant. The Court further held that the employees did not lose the protection of Section 7 because their walkout might have been regarded by others as "unnecessary and unwise," since the employer "was already making every effort" to remedy the situation. The Court explained that "it has long been

settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not" (*id.* at 16). Accordingly, even if petitioner, from its perspective, had "adequately addressed" the employees' concerns, as petitioner contends (Pet. 8), the employees nevertheless retained the right to express their dissatisfaction with the working conditions by walking off the job.[2]

3. This Court's decision in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980), in no way suggests a different result. There the Court approved a rule promulgated by OSHA that prohibits an employer from discriminating against an employee who in good faith refuses to perform work that he reasonably believes may cause death or serious injury. 445 U.S. at 4 n.3, quoting 29 C.F.R. 1977.12(b)(2). Unlike Section 7 of the Labor Act, the purpose of the OSHA regulation is not to protect concerted activities as such; it instead is designed to protect employees in situations in

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[2]The Second Circuit's recent decision in *NLRB* v. *Hudson T. Marsden*, No. 82-41-1 (Feb. 23, 1983), is not to the contrary. The court in that case explicitly adhered to the principle of *Washington Aluminum* that the reasonableness of the goals of the employees' concerted activities is not for the Board or courts to determine (slip op. 1965). In *Marsden*, the construction employees decided to stop working one day because of a light rain, even though they had done nothing to make their employer aware of any complaint about their working conditions. The court held that, in these circumstances, the walkout was unprotected by Section 7, because it was unaccompanied by any demand by the employees — whether before, after, or at the same time as the concerted activities (slip op. 1963-1966). Here, however, petitioner was well aware of the employees' concerns about exposure to ammonia fumes, and indeed petitioner does not contend that it did not know the nature of the employees' protests. As shown in the Statement, the employees had repeatedly complained to OSHA about that exposure, and, on the day of the walkout, they had expressly communicated their displeasure over the fumes to management personnel. See *NLRB* v. *Washington Aluminum Co.*, *supra*, 370 U.S. at 14-15.

which the scheduling of an on-site inspection by OSHA personnel cannot be arranged before the employee is exposed to conditions that could cause death or serious injury; accordingly, the regulation applies even to a single employee's refusal to work in the face of hazardous conditions. See 445 U.S. at 8-11.

Contrary to petitioner's apparent suggestion (Pet. 6-7), neither the regulation at issue in *Whirlpool* nor the Occupational Safety and Health Act itself (29 U.S.C. 651 *et seq.*) supplants the protection afforded employees' concerted activities by Section 7 of the NLRA. To the contrary, this Court made clear in *Whirlpool* that "the law then [when the Occupational Safety and Health Act was passed], *as it does today*, already afforded workers a right, under certain circumstances, to walk off their jobs when faced with hazardous conditions," including the right "[u]nder Section 7 [of the NLRA] * * * to strike over safety issues" (445 U.S. at 17-18 n.29 (emphasis added)). Indeed, the Court in *Whirlpool* cited *Washington Aluminum* for the proposition that there is a right under Section 7 "to strike over safety issues" (445 U.S. at 18 n.29). And, the Court cited *Washington Aluminum* for this proposition even though there is no indication that the employees who walked off to protest the cold working conditions in that case were confronted with working conditions that could have caused death or serious injury or, therefore, that they would have been entitled to the separate protection of the OSHA regulation involved in *Whirlpool* if it had been in effect at the time. Thus, as the Court recognized in *Whirlpool*, the OSHA statute and the regulations issued under it were intended to supplement, rather than displace, the protection afforded employees by the Labor Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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